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IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1836

GREGORY K. LEWIN,

PETITIONER,

VS.

STATE OF NEW JERSEY,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION
PETITION FOR REHEARING

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1836

GREGORY K. LEWIN, Petitioner

v.

STATE OF NEW JERSEY, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on October 9, 1979 and (2) granting the petition. As grounds for this motion, petitioner states that the following substantial reasons to grant the petition were not previously presented to the Court:

1. THE NEED FOR MIRANDA WARNINGS IS DETERMINED BY THE NATURE OF THE INTERROGATION, NOT BY THE NATURE OF THE OFFENSE.

The petitioner was questioned while in the custody of the police. He had struck two pedestrians with his automobile, one of whom died later that night. The statement introduced on the State's case was not the product of a routine, on-the-street investigation of a traffic offense but rather the product of an interrogation that took place at police headquarters.

Miranda v. Arizona, 384 U.S. 436 (1964) does not prohibit the introduction of responses to on the scene inquiries by the police because "In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." Id., p. 477-478. In Clay v. Riddle, 541 F. 2d 456 (4th Cir. 1976) the majority held Miranda inapplicable to a statement which arose, after questioning by a police officer "in the environs of the unlawful highway operation of an automobile..." Dissenting Judge Butzner argued

that the interrogation was conducted after the defendant had been "taken into custody for interrogation about the traffic offense" (at 459). He went on to state the view that "the need for giving Miranda warnings should be determined by the nature of the interrogation, not the nature of the offense" and rejected the nonapplication of Miranda because of the triviality of the offense.

The petition for certiorari before the Court contained the suggestion that Miranda should apply to any offense committed where there was a potentiality of incarceration. (See reason II for granting the writ) The petitioner now requests that the Court consider the grounds contained in Judge Butzner's dissent in Clay v. Riddle, supra at 460, and the cases supporting his position cited therein, for granting the petition.

2. THE POLICE OFFICER HAD PROBABLE CAUSE TO ARREST PETITIONER FOR CRIMINAL ASSAULT AND SHOULD HAVE GIVEN MIRANDA WARNINGS PRIOR TO ANY QUESTIONING AT POLICE HEADQUARTERS.

The trial testimony of the arresting police

officer indicated that he had probable cause to arrest the petitioner for an indictable criminal offense rather than the motor vehicle violation for which he was ostensibly arrested and questioned at police headquarters. He testified that he arrived at the scene and observed two people lying in the road; that one individual (who shortly thereafter died) had sustained severe bodily injuries (the officer described his breathing as very heavy and had observed him bleeding from the mouth and ears and it appeared to him that both legs were broken); that the petitioner had admitted to striking both persons in response to the officer's on the scene questioning; that the officer smelled alcohol on the petitioner's breath and observed him swaying.

In State v. Schutte, 87 N.J.L. 15, 93 A. 112 (1915) affmd 88 N.J.L. 396, 96 A. 659 (1916), the court held that the malice and intention required for a criminal assault can be implied from driving an automobile at an excessive speed since it is a willful act likely to inflict injury. It is submitted that a criminal assault can be implied from driving an automobile under the influence of alcohol as well as from driving it at an excessive speed as in Schutte. Based on the totality of circumstances, there was probable cause to arrest the petitioner for an atrocious assault and battery in violation of N.J.S.A. 2A: 90-1.

The crime of atrocious assault and battery concerns itself with both the kind and severety injuries inflicted and the nature of the attack. Where a maiming or wounding is done by an assault and battery which is savagely brutal or inhumanly cruel or violent it amounts to an "atrocious assault and battery" within the intent of the statute. State v. Capawanna, 118 N.J.L. 429, 193 A. 902 (1937), affmd 119 N.J.L. 337, 196 A. 679. Given the nature of the officer's observations at the scene, it is unreasonable to believe that he was merely questioning the petitioner back at headquarters about a "petty offense" as the court in State v. Macuk, 57 N.J.1, 268 A. 2d 1 (1970) at 9 labeled motor ve-

hicle violations.*

The factual situation encountered by the arresting officers in Macuk, was much different than that encountered by the officer in the case at bar. In Macuk the police were indeed confronted with a "petty offense" situation:

> "Two policemen were separately dispatched to the scene. No sign of an accident was found, but an unoccupied car was observed at an angle off the road partly in a ditch the doors were locked. Officer Gross, the first to arrive, noticed a man who proved to be the defendant sitting on the porch of a nearby house. In response to the officer's question he admitted he had been driving the car and identified himself... He admitted he had been drinking. (57 N.J. at 5)

The serious nature of the offense and thus the necessity for constitutional safeguards did not escape recognition by another police officer who took a tape recorded statement from the petitioner at headquarters that night. Prior to this second round of questioning, the other officer gave the petitioner Miranda warnings prior to the police receiving

* Macuk is the New Jersey Supreme Court decision relied upon by the New Jersey Superior Court, Appellate Division in State v. Lewin, 163 N.J. Super 441, 395 A. 2d 212 to which the petition for certiorari is directed.

notice of the victim's death.**

It is submitted that the fact that the victim had not yet expired when the officer elicited the responses the petitioner seeks to suppress is of no consequence. To give recognition to the fiction that the questioning by the officer at police headquarters was undertaken to gather information soley for a traffic violation prosecution would be to ignore the evidence gathered by the officer at the scene. To hide behind semantics and postulate that there could have been no criminal assault in this case because what had occurred was a traffic violation or an "accident" up until the time of the death would belie the definition of the latter term. Accident is a defense to the charge of criminal assault because it negates the intent. It is not a defense, however, when an unforseen event, misfortune, act or ommission is the result of negligence. Only when a person commits an act or makes an ommission through misfortune or by accident under circumstances that show no evil design,

** The introduction of this tape recorded second statement is not objected to by petitioner. (See petitioner's Reply Memorandum, page 3)

intention or culpable negligence, he does not thereby commit a crime. State v. Edwards, 28 N.J. 292 (1958); State v. Currie, 41 N.J. 531 (1964). (emphasis added)

In sum, there was ample evidence of a criminal assault available to the officer for the arrest of the defendant. Due to the serious nature of the offense, Miranda warnings should have been given by that officer before any questioning at police headquarters proceeded. Since the defendant was not properly advised of his rights, the trial court erred in permitting the defendant's in-custody statements to go before the jury.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certeriori, petitioner prays that this court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

THOMAS EDWARD PLANT
COUNSEL FOR PETITIONER

October 29, 1979

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

THOMAS EDWARD PLANT
COUNSEL FOR PETITIONER